U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10088440

Date: JULY 10, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a physical therapist under the second-preference, immigration classification for members of the professions holding advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate: the Beneficiary's qualifications for the offered position or the required immigrant visa classification; the company's intention to employ the Beneficiary in the geographic area of intended employment; or the company's ability to pay the position's proffered wage.

The Petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification of the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If DOL approves a position, an employer next submits the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a foreign national may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks physical therapists and that employment of foreign nationals in these "Schedule A" positions will not harm the wages or working conditions of U.S. workers in similar positions. 20 C.F.R. § 656.5. DOL therefore does not require employers to advertise physical therapist positions to U.S. workers and has authorized USCIS to adjudicate labor certification applications in Schedule A petition proceedings for physical therapists. 20 C.F.R. § 656.15(a). Thus, in this matter, USCIS rules not only on the petition, but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS' labor certification determinations in Schedule A proceedings as "conclusive and final").

II. THE REQUIREMENTS OF THE OFFERED POSITION AND THE REQUESTED CLASSIFICATION

Advanced degree professionals must hold "advanced degrees or their equivalents." Section 203(b)(2)(A) of the Act. The term "advanced degree" means:

> any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

A petitioner must also establish a beneficiary's possession of all job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] The job-offer portion of a Schedule A application for an advanced degree professional must demonstrate that an offered position requires a professional holding an advanced degree or the equivalent. 8 C.F.R. § 204.5(k)(4)(i).

Here, the accompanying Schedule A application states the minimum requirements of the offered position of physical therapist as a U.S. bachelor's degree in physical therapy, or a foreign equivalent degree, and five years of experience, including at least one year of experience in the United States. Because the Petitioner requests immigrant visa classification as an advanced degree professional, we interpret the Schedule A application as requiring the Beneficiary to have at least five years of progressive, post-baccalaureate experience in the specialty of physical therapy. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree").[2]

The Petitioner documents the Beneficiary's receipt, by the petition's priority date, of a five-year bachelor's degree in physical therapy from a college in the Philippines. The record also contains an independent, professional evaluation asserting the equivalency of the Beneficiary's foreign education to at least a U.S. master's degree in physical therapy.

As previously indicated, a beneficiary with a foreign degree may qualify as an advanced degree professional if the degree equates to at least a U.S. master's degree, or if the degree equates to a U.S. baccalaureate and precedes at least five years of progressive experience. 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree"). The education evaluation submitted by the Petitioner concludes that the Beneficiary's foreign education equates to a U.S. master's degree. But, contrary to the requirements of the requested immigrant visa classification, the record does not establish the Beneficiary's possession of a foreign degree equating to a U.S. master's degree. The evaluation states its consideration of not only the Beneficiary's bachelor's degree, but also his later, additional studies at another Filipino institution that did not award him a degree. The evaluation analyzes the Beneficiary's coursework rather than his degree and does not specify the U.S. equivalent of his

[1] This petition's priority date is June 28, 2018, the date of the petition's filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] The record documents the Beneficiary's satisfaction of the position's other stated requirement of certification in cardiopulmonary resuscitation (CPR).

baccalaureate coursework. Because the evaluation appears to base its conclusion, in part, on coursework that the Beneficiary completed after his baccalaureate studies, the document does not establish his possession of a single foreign degree equating to a U.S. master's degree.

As the record does not establish the Beneficiary's possession of a master's degree, he must seek to qualify as an advanced degree professional based on a bachelor's degree followed by at least five years of progressive experience in physical therapy. As previously indicated, the evaluation submitted by the Petitioner does not consider the U.S. equivalency of the Beneficiary's bachelor's degree. But the Electronic Database for Global Education (EDGE), an online resource that federal courts have found to be a reliable peer-reviewed source of foreign educational information, indicates that five-year, Filipino bachelor's degrees in physical therapy equate to U.S. baccalaureates in physical therapy.[3] The record therefore establishes the Beneficiary's possession of a foreign degree equating to a U.S. bachelor's degree in physical therapy.

Thus, to evaluate the Beneficiary's qualifications for both the requested immigrant visa classification and the offered position, we must now determine whether he has the requisite five years of post-baccalaureate, progressive experience in physical therapy. On the Schedule A application, the Beneficiary attested that, by the petition's priority date, he gained about 11 years of full-time experience as a physical therapist in the Philippines and the United States. In response to the Director's written notice of intent to deny (NOID) the petition, the Petitioner submitted letters from two of the Beneficiary's purported former employers supporting the claimed, qualifying experience. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to provide letters from a beneficiary's former employers). A letter from a Filipino healthcare business states its employment of the Beneficiary as a physical therapist for more than six years, from February 2006 to June 2012. A letter from a U.S. healthcare business states that the Beneficiary worked for it as a physical therapist for about one year, eight months, from September 2013 to May 2015.

Contrary to 8 C.F.R. § 204.5(g)(1) and as the Director's decision notes, however, the letter from the U.S. healthcare business does not describe the Beneficiary's job duties. The letter therefore does not establish the Beneficiary's qualifying experience for the requested immigrant visa classification or the offered position. The letter also does not establish the Beneficiary's possession of the requisite one year of experience in the United States.

The letter from the Filipino healthcare business describes the Beneficiary's experience. But, as the Director found, the letter does not establish the requisite progressive nature of the Beneficiary's experience. Also, the Beneficiary attested on the labor certification application that, during his full-time tenure with the Filipino healthcare business, a Filipino clinic simultaneously employed him full-time as a physical therapist for about a year, from July 2011 to June 2012. In addition, a prior labor certification application for the Beneficiary omits the Filipino healthcare business as a former employer of the Beneficiary. But he attested on the prior application that he worked full-time for the Filipino clinic for more than two years. A prior petition includes a letter from the clinic confirming

[3] EDGE was created by the American Association of Collegiate Registrars and Admission Officers (AACRAO), a non-profit, voluntary, association of more than 11,000 higher education professionals representing about 2,600 institutions in more than 40 countries. *See* AACRAO, "Who We Are," https://www.aacrao.org/who-we-are (last visited July 1, 2020); *see also Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (describing EDGE as "a respected source of information").

its employment of him from February 2010 to October 2012. The Beneficiary's two 2012 applications for nonimmigrant U.S. visas also state that he worked for the Filipino clinic from about March 2010 to at least July 2012. The visa applications do not indicate his employment by the Filipino healthcare business. Rather, the visa applications state that he worked for a different Filipino company from November 2007 to March 2010 as a product manager, managing sales and marketing of medical equipment. The Petitioner has not explained the Beneficiary's overlapping employment or the discrepancies in employers and claimed dates of employment among the labor certification and visa applications. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The unresolved discrepancies cast doubt on the Beneficiary's claimed, qualifying experience in the Philippines.

On appeal, the Petitioner submits new letters from both the U.S. and Filipino businesses that previously provided documents in this matter. The Director's NOID, however, notified the Petitioner of its need to submit letters from the Beneficiary's former employers describing at least five years of post-baccalaureate employment and the progressive nature of his experience. The NOID also afforded the company a reasonable opportunity to respond. We therefore reject the new letters on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (barring consideration of appellate evidence if a petitioner previously received notice of the required materials and an opportunity to provide them). Even if we could accept the new letters, they would not resolve the previously discussed discrepancies in the Beneficiary's Filipino employment history to establish the required experience. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

For the foregoing reasons, the Petitioner has not demonstrated the Beneficiary's possession of the qualifications for the offered position or the requested immigrant visa classification. We will therefore affirm the petition's denial.

III. THE AREA OF INTENDED EMPLOYMENT

A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying application for labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54. 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of the accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Here, the Form I-140 and Schedule A application state the Petitioner's proposed employment of the Beneficiary in the offered position of physical therapist at the company's office near [redacted] Texas. The Petitioner's application for a prevailing wage determination (PWD), however, indicates that the position involves work at other locations in the Houston area. The PWD application states that the job requires "[t]ravel going to and from the patients' places of residence within [redacted] and other nearby counties." The Director therefore concluded that the Petitioner appeared to intend to employ the Beneficiary "outside the terms" of the Schedule A application.

In response to the Director's NOID, the Petitioner stated that it provides services to patients "in the [redacted] area" and submitted copies of contracts with clients in that area. On the Schedule A application, the Petitioner should have more accurately described the geographic area of intended

employment as the company's office and patients' homes in the [redacted] metropolitan area. But we do not find the deficiency to merit the application's denial.

A Schedule A petition must include a PWD. 20 C.F.R. § 656.15(b)(1) (referencing 20 C.F.R. § 656.40). A petitioner must ask DOL for a PWD for the "area of intended employment." 20 C.F.R. § 656.40(a). That term means "the area within normal commuting distance of the place (address) of intended employment." 20 C.F.R. § 656.3. "If the place of intended employment is within a Metropolitan Statistical Area (MSA) . . ., any place within the MSA . . . is deemed to be within normal community distance of the place of intended employment." *Id.*

Based on the information in the Petitioner's PWD application, DOL determined the area of intended employment to be the MSA of '[redacted] Tex." The Petitioner's office is in this MSA, which also includes [redacted], and seven other counties surrounding [redacted] *See* DOL, Foreign Labor Data Center, "FLC Wage Search Wizard," https://www.flcdatacenter.com/OesWizardStart.aspx (last visited July 2, 2020). The record indicates that the offered position of physical therapist serves patients in the DOL-selected MSA of [redacted] Tex. Thus, the Petitioner's imprecise description of the area of intended employment does not affect the validity of the position's proffered wage. *See* 20 C.F.R. § 656.10(c)(1) (requiring prospective employers to attest that their proffered wages equal or exceed the prevailing wages of the respective occupations).

The Director found that the Petitioner's Schedule A application should have stated that the Beneficiary would work at "various unanticipated locations throughout the United States." DOL policy allows labor certification employers who state this phrase on applications to list their headquarters as areas of intended employment if the employers cannot foresee where intended employees in "roving" positions would work at the time they obtain lawful permanent residence. *See* DOL, *Field Memorandum No. 48-94*, 4 (May 16, 1994).[4] The record, however, does not indicate that the offered position involves work at locations "throughout the United States." Rather, the record indicates that the Beneficiary would work only within the MSA of [redacted] Tex. The DOL policy cited by the Director therefore does not apply to this case. Omission of the phrase "various unanticipated locations throughout the United States" from the Schedule A application therefore does not warrant the application's denial.

For the foregoing reasons, the record supports the Petitioner's intention to employ the Beneficiary in the area of intended employment. We will therefore withdraw the Director's contrary finding.

IV. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R.

[4] The Petitioner contends that DOL "cancelled" Field Memorandum No. 48-94 and that its guidance is no longer valid. DOL officials, however, continue to cite the memorandum in support of existing agency policy. *See, e.g, Matter of Thomas & Betts Corp.*, 2016-PER-00272, slip op at 4 (BALCA Sept. 4, 2019) (Certifying Officer citing the memo in support of DOL's "long-standing position" that an employer's headquarters must be used for PWD and recruitment purposes when the location of a job worksite cannot be anticipated).

§ 204.5(g)(2). For petitioners with less than 100 employees, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary a full proffered wage each year from a petition's priority date. If a petitioner did not employ a beneficiary or did not annually pay him or her the full proffered wage, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[5]

Here, the accompanying Schedule A application states the proffered wage of the offered position of physical therapist as $89,835 a year. As previously noted, the petition's priority date is June 28, 2018.

At the time of the appeal's filing, evidence of the Petitioner's ability to pay the proffered wage in 2019 was not yet available.[6] Thus, for purposes of this decision, we will consider the Petitioner's ability to pay only in 2018, the year of the petition's priority date.

The record indicates the Petitioner's employment of the Beneficiary in nonimmigrant work visa status since July 2017. The company submitted copies of state quarterly payroll tax records for 2018 indicating its payment of wages to the Beneficiary that year of $85,056.02. This amount does not equal or exceed the annual proffered wage of $89,835. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. The company need only demonstrate its ability to pay the difference between the annual proffered wage and the wages it paid the Beneficiary, or $4,778.98.

A copy of the Petitioner's federal income tax return for 2018 reflects net income of $17,362 and net current assets of $31,224. Both these amounts exceed the $4,778.98 difference between the annual proffered wage and the wages the Petitioner paid the Beneficiary. The record therefore establishes the Petitioner's ability to pay the proffered wage.

The Petitioner has demonstrated its ability to pay the proffered wage from the petition's priority date. We will therefore withdraw the Director's contrary finding.

V. CONCLUSION

The record establishes the Petitioner's intention to employ the Beneficiary in the stated area of intended employment and the company's ability to pay the proffered wage of the offered position.

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[5] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[6] The Petitioner submitted financial statements for January 1, 2019, through August 5, 2019. Contrary to 8 C.F.R. § 204.5(g)(2), however, the statements do not indicate that they were audited. Also, because of the cyclical nature of some businesses and the possibility of short-term economic fluctuations, finances over a period of less than one year are not reliable enough to demonstrate an ability to pay a proffered wage.

The Petitioner, however, has not demonstrated the Beneficiary's qualifications for the offered position or the requested immigration visa category. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.